Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection of Regulatory	)	MD Docket No. 07-81
Fees for Fiscal Year 2007	)	

JOINT COMMENTS

ARCOS-1 USA, Inc., Brasil Telecom of America, Inc., Caribbean Crossings Ltd., Global Crossing Ltd., Hibernia Atlantic, Pacific Crossing Limited and PC Landing Corp. ("Joint Commenters"), jointly file these comments in response to the Notice of Proposed Rulemaking in the captioned proceeding ("Notice"), to urge the Federal Communications Commission ("Commission") to determine a new basis for assessing regulatory fees on cable landing licensees in place of the current outdated methodology based on international bearer circuits ("IBCs") and to propose a new 2007 regulatory fee for submarine cables in place of the fee proposed in the Notice. Each of the Joint Commenters is the owner of one or more private submarine cable systems that land in the United States and they, or their customers holding Section 214 authority, will be required to pay 2007 IBC regulatory fees unless such fees are waived or deferred.

For a number of years, certain of the Joint Commenters and other cable owners have put the Commission on notice that the high regulatory fees for IBCs are putting enormous financial pressure on the submarine cable industry, are causing distortions in the marketplace, and are hindering the development of new or upgraded cable systems.[1] Unfortunately, the Commission

[1] *See, e.g.*, Comments of Tyco Telecommunications (US) Inc., MD Docket No. 04-73 (filed April 21, 2004); Comments of Tyco Communications (US) Inc., MD Docket No. 05-59 (filed March 8, 2005); VSNL Telecommunications (US) Inc., Petition for Rulemaking, RM-11312, filed February 3, 2006 ("VSNL Petition").

has ignored these developments and has declined to adopt a more rational and equitable methodology based on the actual cost to regulate the submarine cable industry.[2] Another year has passed, and the Joint Commenters collectively reach out to the Commission to take action to revise the methodology used to determine submarine cable regulatory fees for 2007 and beyond to reflect market realities and the changes that have taken place in the marketplace.

Over a year ago, VSNL Telecommunications (US) Inc. filed its petition for rulemaking proposing a different approach to assessing regulatory fees on private submarine cables. Although the Commission requested comment on the VSNL Petition, and many of the Joint Commenters filed comments, the Commission has yet to propose a new methodology for submarine cable regulatory fees or to take other action on the Petition. The proposed 2007 regulatory fees, determined on the same IBC basis as prior years, hurt not only the cable industry, but carriers and service providers who acquire capacity from cable owners and, ultimately, the public. These high fees impose an increasingly heavy cost burden on the services supply chain and directly result in higher charges for business and residential consumers. Therefore, the Commission should provide immediate, interim relief and reduce the proposed 2007 regulatory fee applicable to submarine cables to a level that reflects the realities of the marketplace, encourages growth, and is closer to parity with the fees borne by other segments of the industry regulated by the Commission. In addition, the Commission should move ahead with a proceeding to address the best methodology for recovering its costs to regulate the submarine cable industry. If the Commission proceeds with applying the 2007 IBC regulatory fees

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[2] *See* Assessment and Collection of Regulatory Fees for Fiscal Year 2004, *Report and Order*, 19 FCC Rcd. 11662, 11672 (¶29)(2004); *See* Assessment and Collection of Regulatory Fees for Fiscal Year 2005, *Report and Order*, MD Docket No. 05-59, FCC 05-137, ¶9 (2005); Assessment and Collection of Regulatory Fees for Fiscal Year 2006, *Report and Order*, MD Docket No. 06-68, FCC 06-102, ¶18 (2006)

proposed in the Notice, the Commission should later retroactively adjust downward those fees based on the outcome of the methodology proceeding.

I. The Proposed 2007 Regulatory Fee and the Current IBC Regulatory Fee Methodology, Which Have No Rational Basis, Unreasonably and Unfairly Burden the Submarine Cable Industry

The Commission's existing IBC regulatory fee methodology was designed for the voice-centric telecommunications environment of an earlier time. The methodology unfairly penalizes high-capacity submarine cables by assessing regulatory fees based on the number of active 64 kbps voice channel equivalent circuits. Technological advances and new applications have resulted in a shift away from a voice-centric smaller circuit channelized business model towards an application-neutral unchannelized larger capacity broadband model. Even the smallest of the recently deployed submarine cables operating today have vastly more capacity than cables constructed before the mid-1990s.[3] As a result, IBC fees are based on a defunct architecture and place a huge burden on high-capacity submarine cable systems that move data more efficiently and less expensively than earlier cables and satellites.

Under the current rules, regulatory fees may actually represent the single largest cost a submarine cable operator incurs in providing its service. Thus, these rules dramatically raise the cost of service to submarine cable providers, their carrier and service provider customers, and end users. In the longer term, these rules discourage more advanced and higher capacity submarine cables from landing in the United States, making the U.S. less competitive as a telecommunications and information hub. Indeed, Joint Commenters are aware of cable

[3] For example, the trans-Atlantic Columbus-2 cable system brought into operation in 1994 has an aggregate capacity of 560 Mbps, whereas the trans-Atlantic Apollo cable brought into operation in 2003 has a maximum aggregate capacity after DWDM upgrades of 6.4 terabits. Thus the latter cable has roughly 11,400 times the throughput of its nine year old predecessor.

developers that are looking for ways to land in Canada and Mexico in order to avoid these unreasonably high fees.[4]

The current methodology is inappropriate for the application-neutral 21st century cable industry, and places an undue burden on current and future high-capacity submarine cable systems. Under the existing methodology and the 2007 proposed fee, submarine cable landing licensees pay regulatory fees per active international "64 kbps circuit or its equivalent."[5] The 64 kbps circuit, however, is not an accurate indicator of a submarine cable operators revenue, and has absolutely no relationship to the level of regulatory activity these providers generate at the Commission relative to other Commission regulatees. The 64 kbps circuit is an artifact of the original channelized telephone systems installed in the early 1960s by American Telegraph and Telephone ("AT&T").[6] Specifically, each 64 kbps circuit made up one voice channel in the Bell Laboratories ("Bell Labs") T-carrier architecture, which would aggregate twenty-four (24) 64 kbps circuits into a channelized 1.544 Mbps duplex circuit ("T-1") for more efficient transmission between AT&T facilities.[7] Under this architecture, which at the 64 kbps level would become the worldwide standard, each international 64 kbps circuit generated revenue in readily measured per-minute increments. Therefore, a regulatory contribution mechanism that imposed a fee based on 64 kbps circuits could arguably be defended as nondiscriminatory and rational.

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[4] A further consequence of this activity is that the cable landing stations would also fall outside the Administration's national security review and the Commission's CALEA requirements.

[5] 47 U.S.C. § 159(g).

[6] *See In the Matter of Local Telephone Competition and Broadband Reporting*, Report and Order, 19 FCC 22340, 22348 (2004) (footnote 34 discussing 64 kbps and T-1 telephone system architecture).

[7] *See In the Matter of American Telegraph and Telephone Co., Charges for Interstate Telephone Service*, 64 FCC 2d 131, ¶ 63 (1976) (discussing AT&T's implementation of the T-carrier system beginning in 1962).

In contrast, in the current broadband environment, data passes unchannelized in packetized form over submarine cables transporting hundreds of gigabits or even terabits of data simultaneously.[8] The underlying content in these data streams is a mix of video, voice and miscellaneous data applications, and the parties that purchase the capacity typically acquire unchannelized bandwidth for flat rates at the STM-1 to multi-gigabit levels.[9]

The effect of dividing these large multi-gigabit data services into artificial 64 kbps increments for the purpose of assessing regulatory fees places an undue and disproportionate burden on submarine cable regulatees. Whereas a traditional telephone carrier from the 1960s, 70s or 80s generated significant revenue for each 64 kbps circuit actively maintained on an international route, the massive improvements in efficiency and new applications (not billed in minute increments) result in a submarine cable generating very modest revenue per 64 kbps of a high bandwidth service. In fact, because cable systems are not designed to readily break out channelized 64 kbps derivative circuits, discounts for circuits smaller than an STM-1 are typically not available and purchasing a smaller circuit results in financial penalties. The current generation cable-systems are so efficient that the price for capacity typically doubles for every four-fold increase in capacity after an STM-1.[10] Therefore, purchasing a 10 gigabit service is approximately eight times the cost of an STM-1 even though the capacity on a 10 gigabit service is a 64 fold increase over the former service.[11] The end result is the typical 64 kbps circuit equivalent bought as part of a 10 gigabit service is significantly less expensive than a similar

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[8] *See* International Bureau, FCC, 2005 Section 43.82 Circuit Status Data Report, at 35 (Jan. 2007) ("*Circuit Status Report*") (providing a table of current cable systems landing in the U.S.).

[9] An STM-1 (synchronous transport mode) circuit has a bit rate of 155 Mbps.

[10] *See* Hibernia Atlantic Comments in Support of Petition for Rulemaking at 4, filed on March 16, 2006, in VSNL Telecommunications (US) Inc., Petition For Rulemaking RM-11312 ("Hibernia Comments").

[11] *Id*.

circuit bought years ago on an older cable. Accordingly, one operator estimated that under the current methodology, IBC fees for a high-bandwidth service can actually total 50 percent of a submarine cable provider's cost.[12] For example, the proposed 2007 regulatory fees applicable to an active ten gigabit service is $140,313; however, current generation high capacity cable systems permit ten gigabit services on certain routes to be purchased for less than $180,000 per annum.[13]

In dramatic contrast, the 2006 regulatory fees imposed on interstate carriers total just $0.00264 per dollar of revenue, or roughly one quarter of one percent of the price of the service.[14] Similarly, the 2006 interstate wireless regulatory fee totaled only $0.20 per handset,[15] equaling less than one tenth of one percent of the price of wireless services,[16] and the 2006 fee for cable television operators totaled only $0.79 per subscriber,[17] or approximately one tenth of one percent of the price of basic cable television service.[18] Compared to the regulatory fees imposed by the Commission on other authorization holders in different sectors of the telecommunications industry, the IBC fees imposed on high-capacity submarine cable services are hugely disproportionate and at odds with the Commission's long-standing goal of

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[12] *See* VSNL Petition for Rulemaking at 3, RM No. 11312 (2006).

[13] *See* Hibernia Comments at 6. Regulatory fee based on a $1.16 per 64 kbps channel rate multiplied by 120,960.

[14] *See What You Owe - Interstate Telecommunications Service Providers for FY 2006,* Fact Sheet released August 2006.

[15] *See What You Owe - Commercial Wireless Services for FY 2006,* Fact Sheet released August, 2006.

[16] Conservatively assuming the a typical CMRS carrier generates annual revenue of $500 per subscriber, and each subscriber purchases a family plan with at least one additional handset (.40/500 = $.0008).

[17] *See What You Owe - Cable Television Systems for FY 2006,* Fact Sheet released August 2006.

[18] Based on annualized revenue derived from Comcast's reported $60.08 per television subscriber monthly revenue in Q1 of 2007 (.79/720 =$.001) (http://www.cmcsk.com/phoenix.zhtml?c=118591&p=irol-newsArticle&ID=991145&highlight).

maintaining regulatory fees that have a *de minimis* effect on the price of a telecommunications service.[19]

In addition to impairing the U.S. submarine cable industry, and conflicting with the Commission's goal of creating a *de minimis* effect on pricing, the current IBC fees bear no relationship to the low level of Commission regulatory supervision of submarine cables, especially relative to other Commission regulated providers. This creates a direct conflict with the Communications Act of 1934 (the "Act"), which requires the overhaul of regulatory fee methodologies as necessary to ensure a reasonable relationship between the fees and the benefits of regulation. Section 9(b)(1) of the Act only permits the Commission to recover fees that are "reasonably related to the benefits provided by the payor of the fee by the Commission's activities…"[20] If the Commission "determines that the Schedule requires amendment to comply with" this requirement, then the Commission "shall… amend the Schedule of Regulatory Fees."[21] No additional manpower or oversight is required to regulate a current generation multi-gigabit cable system relative to an older less efficient cable. Thus, basing the entire international regulatory fee contribution mechanism on a cable's capacity to accommodate narrowband voice channels that no longer generate appreciable amounts of revenue cannot be rationalized as a scheme that offers the underlying regulated party a reasonably related benefit for the Commission's regulatory activity. Clearly the dramatic changes in the submarine cable industry described above and the hugely disproportionate burden borne by submarine cable operators

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[19] *See In the Matter of Assessment and Collection of Regulatory Fees for Fiscal Year 2007*, Notice of Proposed Rulemaking, FCC 07-55 (rel. April 18, 2007) (noting that regulatory fees only seek to collect "the necessary amount [Congress requires]… in the most efficient manner possible without undue public burden").

[20] 47 U.S.C. § 159(b)(1).

[21] 47 U.S.C. § 159(b)(3) (emphasis added).

under the current IBC rules demonstrate that the "Schedule requires amendment" to realign the benefits received by the submarine cable operators with the level of regulatory activity.

In short, the Commission's regulatory contribution scheme for submarine cables has failed to evolve with the market, has no rational basis, and the imposition of the proposed 2007 regulatory fee will impose an undue burden on the submarine cable industry relative to other Commission regulates, contrary to the requirements of Section 9 of the Act.

II. High International Bearer Circuit Regulatory Fees are Confiscatory

The Commission's failure to recognize the changes to the industry has now led to a situation where the proposed IBC regulatory fees have reached confiscatory levels and therefore constitute an illegal taking under the Fifth Amendment to the Constitution of the United States. The Fifth Amendment states that "private property shall [not] be taken for public use without just compensation."[22] This prohibition applies equally to physical invasions or trespasses as it does to governmental actions that prevent a party from using its property.[23] In applying the Fifth Amendment to regulated utilities, the Supreme Court has generally reviewed cases where the public utility commission has set rates at such a low level that they do not afford the utility sufficient compensation, and therefore are so "unjust" as to be confiscatory.[24] In particular, a rate is an illegal taking if it is "so unjust as to destroy the value of [the] property for all the purposes for which its was acquired," and thereby "practically deprive the owner of property without due process of law."[25]

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[22] U.S. Const. amend. V.

[23] *See, e.g., Reagan v. Farmers' Loan & Trust Col,* 154 U.S. 362, 410 (1894).

[24] *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989); *FPC v. Texaco, Inc.*, 417 U.S. 380, 391-392 (1974).

[25] *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896).

The Supreme Court has established three factors for analyzing such a regulatory takings claim: (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action.[26] Although the Commission has not established the rates carriers may charge for the sale of IBCs, the high fees it effectively imposes on such sales have had the same unconstitutional confiscatory effect. As previously discussed, the international market drives the price carriers can charge for international bearer circuits, and those prices have dropped dramatically in the last few years. In such a highly competitive market, carriers have low profit margins and little ability to adjust their rates higher without losing customers. The proposed imposition of excessively high regulatory fees, would have the same result as if the Commission were acting in a traditional ratemaking case setting the rates too low -- the carriers lose the ability to enjoy the fruits of their investments without any just compensation.

In particular, using the Supreme Court's three factors, (1) the economic impact of the regulation; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action, it is clear that the Commission's proposed regulatory fees are confiscatory. First, the Joint Comments as well as comments filed in the last three Regulatory Fee proceedings, and in response to the VSNL Petition, have all demonstrated the negative impact of the high regulatory fees imposed by the Commission. Second, as discussed above, cable companies have invested hundreds of millions of dollars in submarine cable facilities with the expectation of making a profit, and being able to upgrade facilities in the future. Yet the imposition of the proposed 2007 regulatory fee threaten to hurt the

[26] *See Texas Office of Public Utility Counsel et al., v. Federal Communications Commission*, 183 F.3d 393, 429 at n. 59 (5th Cir. 1999), *citing Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 225, 106 S.Ct. 1018, 89 L.Ed.2d 166 (1986).

ability of cable companies to upgrade their facilities, or realize profits on existing capacity. Finally, the Commission has wide latitude in the way it may impose regulatory fees, yet it has continued to ignore the realities of the marketplace, and impose confiscatory regulatory fees. The Commission must take action now in this proceeding to lower the proposed 2007 regulatory fees to a rate that is reasonable and equitable and reflects the realities of the marketplace.

III. The Commission Must Exercise Its Authority Now to Lower Rates

The Commenters understand that the Commission has stated that it will review issues related to the methodology of assessing IBC regulatory fees in the context of the VSNL Petition. Yet the Commission has the authority, and the record, to act now to lower the proposed 2007 regulatory fee applicable to submarine cable licensees to a reasonable level to prevent the assessment of impermissibly high and confiscatory IBC regulatory fees. Accordingly, the Joint Commenters respectfully request that the Commission, as an interim measure, reduce the regulatory fees applicable to the submarine cable industry now. But should the Commission reject this request, the Joint Commenters urge the Commission to retroactively adjust downward those fees as part of its comprehensive review of the fee methodology.

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